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No.

In the Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA, PETITIONER

v.

ESTATE OF FRANCIS J. ROMANI

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Since 1797, Congress has provided that any claim of the United States against an insolvent estate "shall be paid first" (31 U.S.C. 3713(a)). Since 1913, Congress has provided that a federal tax lien is not valid against a judgment lien creditor until notice of the tax lien has been filed (26 U.S.C. 6323(a)).

The question presented in this case is whether a federal tax claim against an insolvent estate is to "be paid first" when a judgment lien arose before the notice of tax lien was filed.

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PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the Supreme Court of Pennsylvania in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania (App., *infra*, 1a-13a) is reported at 688 A.2d 703. The opinions of the Superior Court (App., *infra*, 15a-20a) and the Court of Common Pleas (App., *infra*, 21a-25a) are not reported.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on January 17, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

STATUTES INVOLVED

1. 26 U.S.C. 6323(a) provides, in relevant part:

> The lien imposed by section 6321 shall not be valid as against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until notice thereof * * * has been filed by the Secretary.

2. 31 U.S.C. 3713(a) provides, in relevant part:

> (1) A claim of the United States Government shall be paid first when—
>
> (A) a person indebted to the Government is insolvent and—
>
> (i) the debtor without enough property to pay all debts makes a voluntary assignment of property;
>
> (ii) property of the debtor, if absent, is attached; or
>
> (iii) an act of bankruptcy is committed; or
>
> (B) the estate of a deceased debtor, in the custody of the executor or administrator, is not enough to pay all debts of the debtor.
>
> (2) This subsection does not apply to a case under title 11.

STATEMENT

1. On January 25, 1985, a judgment for $400,000 was entered in favor of Romani Industries, Inc., against Francis J. Romani in the Court of Common Pleas of the Commonwealth of Pennsylvania. Romani Industries did not obtain a writ of execution, or otherwise seize any property of the debtor, in satisfaction of the judgment. The judgment remains unpaid (App., *infra*, 22a).

After the date of that judgment, the Internal Revenue Service filed notices of federal tax liens on the property of Francis J. Romani. A federal tax lien arises by operation of law in the property of any taxpayer who "neglects or refuses to pay the [tax] after demand" (26 U.S.C. 6321). A notice of the federal tax lien is filed in the office "designated by the laws of [the] State, in which the property subject to the lien is situated" (26 U.S.C. 6323(f)). The liens for which notices were filed in this case were for unpaid taxes and penalties totaling approximately $400,000 for the years 1982, 1985, 1987, 1988 and 1989 (App., *infra*, 2a).

Mr. Romani died on January 13, 1992. The administrator of his estate sought to transfer the only asset of the estate—real estate having a value of approximately $53,000—to Romani Industries in satisfaction of its outstanding judgment claim. The United States objected to that transfer and filed a proof of claim for federal taxes and interest totalling approximately $489,000 (App., *infra*, 2a). Because the debts of the estate greatly exceed its assets, and the estate is thus insolvent (*ibid.*), the United States claimed first priority for payment of its claim from the assets of the estate under what is known as the "absolute priority" statute. That statute was first

enacted in 1797 (Act of March 3, 1797, ch. 20, § 5, 1 Stat. 515) and is now codified at 31 U.S.C. 3713(a). It provides, in relevant part, that "[a] claim of the United States Government shall be paid first when * * * the estate of a deceased debtor, in the custody of the executor or administrator, is not enough to pay all debts of the debtor." *Ibid.*[1]

Romani Industries contended, however, that the "absolute priority" that Congress established in 31 U.S.C. 3713(a) for claims of the United States against insolvent estates has been impliedly repealed, for tax claims, by 26 U.S.C. 6323(a). That statute, which was first enacted in 1913 (Act of March 4, 1913, ch. 166, 37 Stat. 1016), provides that the federal tax lien "shall not be valid as against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until notice thereof * * * has been filed by the Secretary." 26 U.S.C. 6323(a). Romani Industries claimed that, because it became a "judgment lien creditor" before notice of the federal tax lien was filed, it is entitled to priority under 26 U.S.C. 6323(a) and that the "absolute priority" rule of 31 U.S.C. 3713 is therefore inapplicable to this case.

2. a. The Court of Common Pleas agreed with Romani Industries that 26 U.S.C. 6323(a) impliedly repealed—for federal tax debts—the "absolute priority" rule of 31 U.S.C. 3713(a) (App., *infra*, 21a-25a).

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[1] Under this "absolute priority" statute, the claims of the United States are also to be paid first when an insolvent debtor "makes a voluntary assignment of property," when property of an absent debtor is attached, or when "an act of bankruptcy is committed" (31 U.S.C. 3713(a)(1)). In 1978, however, Congress amended the statute to make it inapplicable to bankruptcy cases brought "under title 11" of the United States Code (31 U.S.C. 3713(a)(2)). See note 6, *infra*.

The court did not discuss or cite the several federal decisions that have rejected this interpretation of these federal statutes. See, *e.g.*, *Nesbitt* v. *United States*, 622 F.2d 433 (9th Cir. 1980), aff'g 445 F. Supp. 824 (N.D. Cal. 1978), cert. denied, 451 U.S. 984 (1981); *Kentucky* v. *United States*, 383 F.2d 13, 14 (6th Cir. 1967). Instead, the court adopted the reasoning of one of the conflicting opinions of the equally-divided court in *In re Estate of Berretta*, 426 A.2d 1098 (Pa. 1981), which concluded that the provisions of 26 U.S.C. 6323(a) evidence a congressional intent to limit the "absolute priority" otherwise established for the collection of federal claims (App., *infra*, 24a).[2] The court stated that this conclusion is supported by the policy concern that application of the "absolute priority" statute to federal tax claims could "frustrate legitimate commercial expectations" (*id.* at 23a).

b. The Superior Court affirmed (App., *infra*, 15a-20a). The court concluded that the governing principle of statutory construction is that an inconsistency between conflicting provisions is to be resolved by allowing the more specific provision to prevail over

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[2] The Pennsylvania courts have long taken a narrow view of the "absolute priority" statute, in a series of cases that are collected and criticized in Note, Nesbitt *v.* United States: *Denying an Implied Tax Lien Exception to the Federal Priority in Insolvency*, 33 Cath. U. L. Rev. 741, 753-759 (1984). The opinion from *Estate of Berretta* on which the court chose to rely in this case was criticized by the opposing opinion from the equally-divided court in *Estate of Berretta* because it "transformed its view of what Congress *should* do into the presumption that Congress has in fact impliedly repealed the Insolvency Statute as to tax liens." *In re Estate of Berretta*, 426 A.2d at 1108 (Roberts, J.).

the more general one (*id.* at 20a). The court stated that 26 U.S.C. 6323(a) is the more specific provision and should therefore prevail over "the general provisions of Section 3713" in any conflict between them (App., *infra*, 20a).

The Superior Court acknowledged that this Court has held that "[o]nly the plainest inconsistency would warrant * * * finding an implied exception to the operation of so clear a command as that of" the absolute priority statute (App., *infra*, 18a, quoting *United States* v. *Emory*, 314 U.S. 423, 433 (1941)). The Superior Court concluded, however, that this exacting standard is met—and that the two statutes are "most certainly, conflicting"—because "[i]n the present context * * * the government's relative priority as a creditor differs depending upon which section is applied" (App., *infra*, 19a).

c. The Supreme Court of Pennsylvania affirmed (App., *infra*, 1a-13a). The court acknowledged that the test applied by this Court in *United States* v. *Key*, 397 U.S. 322 (1970), governs in determining whether 26 U.S.C. 6323(a) impliedly repealed the "absolute priority" rule of 31 U.S.C. 3713(a) for the collection of tax debts (App., *infra*, 5a-6a). In *Key*, the Court stated that an implied repeal of the "absolute priority" statute cannot be found unless (i) there is a facial or "logical[] inconsisten[cy]" between the two statutes, (ii) the allegedly conflicting statute would "be rendered redundant" if the "absolute priority" statute applied or (iii) the "language or legislative history" of the allegedly repealing provision reveals "a purpose incongruous with * * * application" of the absolute priority rule. 397 U.S. at 326.

The Pennsylvania Supreme Court determined that the two statutes are facially inconsistent because,

"with respect to tax liens, section 6323 provides for a 'first in time' priority while section 3713 gives absolute priority to the United States" (App., *infra*, 6a-7a; footnote omitted). The court concluded that the history and purpose of Section 6323(a) evidence "a congressional intent that federal priorities be limited in the tax area, regardless of whether the debtor is insolvent" (App., *infra*, 13a).[3]

The Pennsylvania Supreme Court stated that its conclusions were reinforced by the rationale of this Court's decision in *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715 (1979). In *Kimbell Foods*, this Court held that, in the absence of any federal statutory directive, the relative priority of private liens and consensual liens that arise from government lending programs is to be determined under nondiscriminatory state laws. 440 U.S. at 740.[4] This Court noted in *Kimbell Foods* that commercial transactions

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[3] Although the court sought generally to rely on the legislative policies reflected in the Federal Tax Lien Act, nothing in the history of that Act addresses the specific issues presented in this case. See *Nesbitt* v. *United States*, 445 F. Supp. at 829. To the contrary, in enacting the Federal Tax Lien Act (and on one later occasion as well) Congress *declined* to enact a proposal to repeal the "absolute priority" statute as applied to federal tax claims (*ibid.*):

> This Court cannot lightly disregard the fact that Congress has been requested on at least two occasions to amend § 3466 in a manner which would achieve the result sought here by plaintiff, but it has not yet so amended that section.

[4] The Pennsylvania Supreme Court recognized that "*Kimbell Foods* involves the priority to be accorded a federal consensual loan where the debtor is solvent, and the case at bar involves the question of the priority to be accorded a federal tax lien where the debtor is insolvent" (App., *infra*, 11a).

are ordinarily formed in reliance upon state commercial law and that a different rule for commercial transactions involving the federal government could upset ordinary business expectations. *Id.* at 739. The Pennsylvania Supreme Court reasoned that this same concern applies to the present case, for "the grant of absolute federal priority in insolvency cases, as in solvency cases, would be destructive of commercial stability and would frustrate legitimate commercial expectations" (App., *infra*, 13a).

The Pennsylvania Supreme Court noted that its holding conflicts with the decisions of the "federal courts that have held that section 3713 provides for absolute priority in tax lien cases" (App., *infra*, 12a n.17, citing, *e.g.*, *Nesbitt* v. *United States*, *supra*). The court stated, however, that it was "not persuaded by the reasoning of" those decisions (*ibid.*).

REASONS FOR GRANTING THE PETITION

The decision of the Pennsylvania Supreme Court fails to honor this Court's repeated admonition that "[o]nly the plainest inconsistency would warrant our finding an implied exception to the operation of so clear a command as that of [31 U.S.C. 3713]" (*United States* v. *Key*, 397 U.S. at 324-325, quoting *United States* v. *Emory*, 314 U.S. 423, 433 (1941)). The decision in this case directly conflicts with the decisions of two federal courts of appeals and numerous other federal courts. *E.g.*, *Nesbitt* v. *United States*, 622 F.2d 433 (9th Cir. 1980), aff'g 445 F. Supp. 824 (N.D. Cal. 1978), cert. denied, 451 U.S. 984 (1981); *Kentucky* v. *United States*, 383 F.2d 13, 14 (6th Cir. 1967); App., *infra*, 12a n. 17. The question presented is one of recurring importance to the administration of the tax laws. Resolution of the conflict on this recurring

question is needed to assure uniform treatment of taxpayers and to "ensure as far as possible that similarly situated taxpayers pay the same tax." *Thor Power Tool Co.* v. *Commissioner*, 439 U.S. 522, 544 (1979).

1. a. One hundred and eighty years ago, this Court held that the "absolute priority" statute requires that debts owed to the United States be paid first from insolvent estates even if a competing creditor had previously obtained a valid and enforceable judgment lien. In *Thelusson* v. *Smith*, 15 U.S. (2 Wheat.) 396, 425 (1817), as in the present case, the facts fell "precisely within" the scope of the absolute priority statute. The Court stated that (*ibid.*) (emphasis supplied):

> the question still remains * * * whether this right of preference [under the absolute priority statute] can cut out a prior judgment creditor? The law declares "that in all cases of insolvency, &c., the debts due to the United States shall be first satisfied * * *. *These expressions are as general as any which could have been used, and exclude all debts due to individuals, whatever may be their dignity.* * * * *The law makes no exception in favour of prior judgment creditors; and no reason has been, or we think can be, shown to warrant this court in making one.*

The Court concluded in *Thelusson* that, whenever title and possession remain in "the debtor's estate," the claim of the United States is to "be first satisfied" under the statute. *Id.* at 426. As Justice Cardozo explained for the Court more than a century later, "[t]he ruling [in *Thelusson*] was that the

general lien of a judgment upon the lands of an insolvent debtor is subordinate to the preference established by the [absolute priority] statute unless seizure by a marshal or some other equivalent act has made the lien specific and brought about a change of title or possession." *New York* v. *Maclay*, 288 U.S. 290, 293 (1933). Accord, *United States* v. *Gilbert Associates, Inc.*, 345 U.S. 361, 366 (1953); *United States* v. *Texas*, 314 U.S. 480, 485-486 (1941).[5]

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[5] This Court has "repeatedly reserved the question whether the priority given the United States by [31 U.S.C. 3713(a)] can be overcome even by a prior specific and perfected lien." *United States* v. *Vermont*, 377 U.S. 351, 358 n.8 (1964). The Court has never decided the issue because it has found, in each case, that the competing lien had not divested the debtor of title or possession and that the lien was therefore not sufficiently specific for the question to be squarely raised. See, *e.g.*, *ibid.*; *United States* v. *Gilbert Associates, Inc.*, 345 U.S. 361, 365-366 (1953); *Illinois ex rel. Gordon* v. *Campbell*, 329 U.S. 362, 370 (1946); *United States* v. *Waddill, Holland & Flinn, Inc.*, 323 U.S. 353, 355-356 (1945); *United States* v. *Texas*, 314 U.S. 480, 484-486 (1941); *New York* v. *Maclay*, 288 U.S. 290, 294 (1933); *Spokane County* v. *United States*, 279 U.S. 80, 95 (1929).

The Court has concluded that a mortgage may effect a transfer of title, taking the property outside the estate of the debtor and therefore beyond the reach of the absolute priority statute. See *Conard* v. *Atlantic Insurance Co.*, 26 U.S. (1 Pet.) 386, 445-446 (1828). In so ruling, the Court did "not contemplate that exceptions were being made" from the absolute priority statute; instead, it "conceived that the funds or property affected, being covered by mortgage, belonged in fact to third persons, not to the insolvent debtor." *Massachusetts* v. *United States*, 333 U.S. 611, 634 n.38 (1948). The Court "has been loath to expand" such an exception "to include other types of lien." *Ibid.* The Court has emphasized that none of its decisions lend "support to the assumption that the doctrine of the mortgage cases, whatever its current vitality, would require the subordination of unsecured claims of the United States to a specific and perfected lien." *United States* v. *Texas*, 314 U.S. at 486.

Recognizing that "[t]he law makes no exception in favour of prior judgment creditors" (*Thelusson* v. *Smith*, 15 U.S. (2 Wheat.) at 425), the Court has consistently held that "[o]nly the plainest inconsistency would warrant * * * finding an implied exception to the operation" of the absolute priority statute (*United States* v. *Emory*, 314 U.S. at 433). Under the analysis applied by the Court in *United States* v. *Key*, 397 U.S. at 324-325, such a "plain[] inconsistency" could be said to exist only if (i) the competing statute is logically inconsistent with the absolute priority statute; (ii) an unconditional application of the absolute priority statute would deprive the competing statute of any meaning; or (iii) the history and text of the competing statute reflect an actual intent by Congress to modify the absolute priority statute. See also *id.* at 326-332.[6]

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[6] Outside of bankruptcy proceedings, which are now expressly excepted from the coverage of the statute (31 U.S.C. 3713(a)(2)), this Court has never upheld a claim that Congress has impliedly repealed any aspect of the absolute priority statute. In *United States* v. *Randall*, 401 U.S. 513, 517 (1971), the Court noted that the absolute priority statute had been superseded, for bankruptcy cases, by "the specific priorities granted by Congress [to claims of the United States] in the Bankruptcy Act" (401 U.S. at 517). In *United States* v. *Key*, 397 U.S. at 326-330, however, the Court emphasized that the absolute priority statute "must apply according to its terms except where expressly superseded, or where excluded by a later enactment 'plainly inconsistent' with it" (397 U.S. at 332). Applying this standard, the Court concluded in *Key* that bankruptcy provisions requiring "fair and equitable" treatment of creditors did not justify a departure from the absolute

The test applied by this Court in determining whether an implied exception from the statute exists is not satisfied in this case. As the Sixth Circuit explained in *Kentucky* v. *United States*, 383 F.2d at 14-15, the plain language of the "absolute priority" statute refutes the contention that it has been impliedly repealed for tax claims by 26 U.S.C. 6323(a):

> We at once emphasize that, of the statutes involved, one * * * is a priority statute, and the other—26 U.S.C. § 6323—is a lien statute. If we employ a literal reading of [the absolute priority statute], its language provides the answer to the question before us. We requote it for emphasis:
>
> > "*Whenever* * * * the estate of any deceased debtor, in the hands of the executors or administrators, is *insufficient to pay all the debts due from the deceased*, the debts due to the United States *shall be first satisfied.*

priority Congress established for the claims of the United States. Similarly, in *United States* v. *Emory*, the Court rejected the contention that Section 64 of the Bankruptcy Act of 1898, ch. 541, 30 Stat. 544, which gave certain wage claimants priority over tax and non-tax claims of the United States, impliedly repealed the absolute priority statute in non-bankruptcy cases. In a holding equally applicable to the present case, the Court stated in *Emory* (314 U.S. at 427):

> Neither the language of § 64a nor the Congressional history of the legislation here involved supports the proposition that § 64a was intended to eliminate, either partially or wholly, the priority of claims of the United States in non-bankruptcy proceedings.

See also *Massachusetts* v. *United States*, 333 U.S. 611 (1948).

> The essentials for application of the statute are here present—the taxpayer is deceased; he was a debtor of the United States; his estate is insufficient to pay all his debts. Present these essentials, the debts owing the United States "shall be first satisfied."

The Ninth Circuit reached the same conclusion in *Nesbitt* v. *United States*, 445 F. Supp. at 828, adopted by reference, 622 F.2d at 433:[7]

> There is nothing in either the language or the legislative history of [26 U.S.C. 6323] to indicate that Congress intended to make tax liens the federal government's sole remedy for the collection of unpaid taxes. To the contrary, Congress intended tax liens to supplement existing means for the collection of taxes, including [the absolute priority statute]. There is therefore no basis for saying that Congress, by

[7] The Pennsylvania Supreme Court did not suggest that 26 U.S.C. 6323(a) would have no meaning if it did not impliedly repeal the absolute priority statute. The two statutes obviously differ in their scope and are not logically inconsistent: the absolute priority statute governs the priority of claims of the United States only in insolvencies outside of bankruptcy court (see 31 U.S.C. 3713(a)(2)); by contrast, 26 U.S.C. 6323(a) governs the validity of the federal tax lien against specific types of security interests in cases involving solvent debtors and also in the many insolvency situations to which the absolute priority statute is inapplicable. This Court has often noted that Congress has intentionally chosen to establish greater protection for the United States in cases involving insolvent debtors than in cases "[w]here the debtor is not insolvent." *United States* v. *Vermont*, 377 U.S. at 358. See also *United States* v. *Key*, 397 U.S. at 329; *United States* v. *New Britain*, 347 U.S. 81, 85 (1954).

> creating federal tax liens, intended to modify [the absolute priority statute] in any way.

Justice Whittaker expressed the same views in his concurring opinion in *James* v. *United States*, 366 U.S. 213, 252 & n.4 (1961), in which he concluded that the absolute priority statute remains applicable to tax claims notwithstanding the enactment of 26 U.S.C. 6323. He stated that, "even though the tax claim of the Government may be only a general lien, with notice thereof not yet filed in the proper local office pursuant to 26 U.S.C. § 6323, we have held that it must be accorded priority over the claims of all prior general lienholders" and it therefore has priority in insolvency cases "over the claims of others, including 'judgment creditors.'" 366 U.S. at 252 & n.4.

The Pennsylvania Supreme Court acknowledged (App., *infra*, 12a n.17) that its decision in this case directly conflicts with numerous federal decisions. Because of these conflicting decisions, taxpayers, creditors and the United States will receive different treatment of identical claims solely as a result of geographical happenstance.

b. The Pennsylvania Supreme Court erred in relying on *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715 (1979), as guidance "on the policy considerations that underlie the question of whether the government in the tax arena is to be treated as an ordinary creditor or as a creditor with super-priority" (App., *infra*, 7a). The *Kimbell Foods* case did not involve federal tax claims; nor did it involve insolvent debtors. Instead, it involved "the priority to be accorded a federal consensual loan where the debtor is solvent" (App., *infra*, 11a). The Court expressly noted in *Kimbell Foods* that, when the government is

an involuntary creditor of an insolvent taxpayer, an entirely different set of statutory rules and policy concerns becomes applicable (440 U.S. at 734):

> That collection of taxes is vital to the functioning, indeed existence, of government cannot be denied * * * . The importance of securing adequate revenues to discharge national obligations justifies the extraordinary priority accorded federal tax liens through the choateness and first-in-time doctrines. By contrast, when the United States operates as a moneylending institution under carefully circumscribed programs, its interest in recouping the limited sums advanced is of a different order. Thus, there is less need here than in the tax lien area to provoke protective measures against defaulting debtors in a manner disruptive of existing credit markets.

As an involuntary creditor of delinquent taxpayers, the government cannot "control the factors that make tax collection likely." *Id.* at 736. As a consensual lender, however, the government acts "voluntarily, with detailed knowledge of the borrower's financial status" (*ibid.*).

Recognizing the significant difference between federal tax liens and the consensual liens created under government loan programs, the Court stated in *Kimbell Foods* that "'[a]s a quasi-commercial lender, [the government] does not require . . . the special priority which it compels as sovereign' in its tax collecting capacity." 440 U.S. at 737-738, quoting 557 F.2d at 500. The Pennsylvania Supreme Court thus plainly erred in relying on *Kimbell Foods* in determining the scope of the priority created by statute for the collection of non-consensual debts owed by insol-

vent debtors to the United States "in its tax collecting capacity" (440 U.S. at 738).

c. The Pennsylvania Supreme Court also erred in concluding that the legislative history of 26 U.S.C. 6323(a) reflects an intent by Congress impliedly to repeal the absolute priority statute.

(i) The absolute priority statute is derived from ancient English practice, under which the Crown asserted for itself a priority over all other creditors of an insolvent debtor.[8] In the United States, this priority of the sovereign initially applied only to debts due on bonds and for customs duties. See Act of July 31, 1789, ch. 5, § 21, 1 Stat. 29. By 1797, however, it was made applicable to all debts due the United States from the estate of an insolvent debtor, under a statute whose language has since remained substantially unchanged. See Act of March 3, 1797, *supra*; Act of March 2, 1799, ch. 22, § 65, 1 Stat. 627.

Congress has frequently amended, codified and recodified the absolute priority statute. Indeed, it has done so twice within the past twenty years. In 1978, Congress amended the absolute priority statute to make it inapplicable to bankruptcy cases. See 31 U.S.C. 3713(a)(2); Act of November 6, 1978, Pub. L. No. 95-598, Tit. III, § 322(a), 92 Stat. 2562. In 1982, Congress recodified the absolute priority statute to make minor revisions in its terminology. See Act of September 13, 1982, Pub. L. No. 97-258, Subtit. III, § 1, 96 Stat. 972. In doing so, however, Congress noted that no substantive change in the law was intended. H.R. Rep. No. 651, 97th Cong., 2d Sess. 2-3 (1982).

Congress has never modified the absolute priority statute to eliminate its application to federal tax

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[8] See 33 Hen. VIII, ch. 39, § 74; 13 Eliz. I, ch. 4.

claims. Indeed, the two most recent amendments reflect that Congress, having repeatedly revisited the statute, has determined to make no changes to its scope other than those expressly enacted. As this Court has often observed, the statute contains as "clear a command" now as ever. *United States* v. *Key*, 397 U.S. at 325.

(ii) The legislative history of 26 U.S.C. 6323 does not support any conclusion to the contrary. Beginning in 1866, Congress established a federal tax lien upon all property owned by a delinquent taxpayer. See 26 U.S.C. 6321; Act of July 13, 1866, ch. 184, § 9, 14 Stat. 101. In response to a decision of this Court holding that an unrecorded tax lien had priority in a delinquent taxpayer's property even over a purchaser for value without notice (*United States* v. *Snyder*, 149 U.S. 210 (1893)), the statute was amended in 1913 to make the tax lien ineffective against a mortgagee, purchaser, or judgment creditor whose interests arose before notice of the tax lien was filed. Act of March 4, 1913, ch. 166, 37 Stat. 1016.

In 1966, Congress determined to give similar protection to additional types of secured transactions. The Federal Tax Lien Act of 1966, Pub. L. No. 89-719, 80 Stat. 1125, amended the statute to protect holders of various additional types of commercial security interests from an unfiled tax lien. See H.R. Rep. No. 1884, 89th Cong., 2d Sess. 1-2 (1966); S. Rep. No. 1708, 89th Cong., 2d Sess. 1-2 (1966). The legislative history of that Act, however, reflects that these amendments to the tax lien statute did *not* intend to repeal or modify the absolute priority statute—for Congress declined to enact proposals that had been made at that time for that very purpose. The American Bar Association, which proposed the legislation that resulted

in the Federal Tax Lien Act, had also proposed that the absolute priority statute be amended to subject that statute to the priorities established under the Bankruptcy Act and the Internal Revenue Code. See American Bar Association, *Final Report of the Committee on Federal Liens* 7, 124 (1959) (*Final Report*), contained in *Hearings Before the House Committee on Ways and Means on the Priority of Federal Tax Liens and Levies*, 89th Cong., 2d Sess. 85, 199 (1959).[9] The ABA proposal and report were submitted to Congress, and three bills were introduced containing this proposed revision of the absolute priority statute. *House Hearings*, *supra*, at 75-88, 196-201. These bills, along with the ABA proposal, died in committee. 105 Cong. Rec. 1030, 1258 (1959) (Index).

In 1970, the ABA submitted to the Senate Judiciary Committee a similar proposed amendment to the absolute priority statute. S. 2197, 92d Cong., 1st Sess. (1971); see Plumb, *The Federal Priority in Insolvency: Proposals for Reform*, 70 Mich. L. Rev. 1, 9-10 (1971). This bill also died in committee.

Congress has thus—on at least two occasions—declined to enact legislation to limit the application of

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[9] The ABA proposed to amend the absolute priority statute to "preserve, ahead of the priority of non-lien federal claims, any non-federal lien or security that would have been entitled to priority over the claim of the United States immediately prior to the divestment of the debtor's property" and to "assure, contrary to the suggestions made in some decisions, that any lien which would qualify for priority in the absence of insolvency would continue to enjoy such priority." *Final Report*, *supra*, at 124. Under the ABA's proposal, the order of priorities specified in 26 U.S.C. 6323(a) would thus have been applicable in insolvency.

the absolute priority statute to tax claims. As the Ninth Circuit concluded in *Nesbitt* v. *United States*, 622 F.2d at 433, aff'g 445 F. Supp. at 829, this history reflects that Congress did *not* intend to change that statute. To the contrary, by recodifying the absolute priority statute in 1982 without making any change in its application to tax claims, Congress reaffirmed the broad and "clear * * * command" of the statute (*United States* v. *Key*, 397 U.S. at 325). The words that Congress has employed in the absolute priority statute remain "broad and sweeping and, on their face, admit of no exception to the priority of claims of the United States" (*United States* v. *Waddill Co.*, 323 U.S. 353, 355 (1945)).

3. Whether 26 U.S.C. 6323(a) impliedly repealed application of the absolute priority statute to federal tax claims is a question of substantial, recurring importance. The question is frequently raised, frequently litigated and often placed in doubt. See App., *infra*, 12a n.17. Many decisions have agreed that the absolute priority statute remains applicable to tax claims. *E.g.*, *Nesbitt* v. *United States*, *supra*; *Kentucky* v. *United States*, *supra*; *H.B. Agsten & Sons, Inc.* v. *Huntington Trust & Savings Bank*, 388 F.2d 156, 160 (4th Cir. 1967) (Haynsworth, J., concurring), cert. denied, 392 U.S. 1025 (1968); *Durham* v. *United States*, 545 F. Supp. 1093, 1096 (D.N.J. 1982), aff'd without opinion, 720 F.2d 661 (3d Cir. 1983); *Carter* v. *Carter*, 681 F. Supp. 323, 328 (E.D. Va. 1988); *Estate of Frazier* v. *District Director, Internal Revenue Service*, 92-2 U.S. Tax Cas. (CCH) ¶ 60,120 (N.D. Ga. 1992); *Spira* v. *United States*, 76-2 U.S. Tax Cas. (CCH) ¶ 9600 (1976); *Estate of Silberman* 46 Cal. Rptr. 2d 610 (Ct. App. 1995); *Back* v. *IRS*, 445 A.2d 1057 (Md. Ct. Apec. App. 1982).

Other decisions, however, have agreed with the contrary view adopted by the Pennsylvania Supreme Court in this case. *E.g.*, *City of Vermillion* v. *Stan Houston Equipment Co.*, 341 F. Supp. 707 (D.S.D. 1972); *Talcott, Inc.* v. *Roto American Corp.*, 302 A.2d 147 (N.J. Ch. 1973); see also *Exchange Bank & Trust Co.* v. *Tubbs Mfg. Co.*, 246 F.2d 141 (5th Cir.), cert. denied, 355 U.S. 868 (1957). The question frequently arises in connection with estate proceedings in state courts (*e.g.*, *Succession of Nobles*, 684 So.2d 973 (La. Ct. App. 1996). This yields an even greater potential for disparate results than ordinarily occurs in federal tax litigation.

In the absence of a decision by this Court resolving this conflict, the question whether Section 6323(a) has impliedly repealed application of the absolute priority statute to federal tax claims will continue to foment recurring and wasteful litigation. Disparate treatment of otherwise identically situated taxpayers and creditors would occur, for the applicable rule of priority would then depend upon geographic happenstance. Resolution of this recurring question by this Court is needed to avoid continuing uncertainty and to assure even-handed application of the revenue laws.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1997

APPENDIX A

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

No. 59 W.D. Appeal Docket 1995

IN RE: ESTATE OF FRANCIS J. ROMANI

v.

APPEAL OF: THE UNITED STATES OF AMERICA

Appeal from the Judgment of Superior Court
entered at No. 1358 Pittsburgh 1994
on May 12, 1995, affirming the order of the
Court of Common Pleas, Cambria County,
Orphan's Court Division entered July 7, 1995
at No. 11-94-14

[Argued: Sept. 17, 1996]
[Decided: Jan. 17, 1997]

OPINION OF THE COURT

Before: FLAHERTY, C.J., and ZAPPALA, CAPPY, CASTILLE, NIGRO and NEWMAN, JJ.

FLAHERTY, Chief Justice.

The United States appeals a judgment of the Superior Court which affirmed an order of the Court of

Common Pleas of Cambria County granting a petition filed by the Estate of Francis J. Romani to transfer real estate in lieu of execution. We affirm. [1]

Francis J. Romani, who died on January 13, 1992, left an insolvent estate with debts greatly exceeding the value of the sole asset, a piece of real estate valued at $53,001.00. This real estate is burdened by a judgment lien and a federal tax lien. On January 25, 1985, a judgment lien was entered and properly revived against Mr. Romani in favor of Romani Industries, Inc. in the amount of $400,000.[2] Subsequent to the entry of judgment against decedent, the Internal Revenue Service filed notice of a federal tax lien against the decedent for unpaid taxes and an unpaid civil penalty that, with interest, totaled $489,720.04.

The administrator of the Estate of Francis J. Romani filed a petition in the Court of Common Pleas of Cambria County to transfer the real estate in lieu of execution on behalf of the judgment creditor, Romani Industries, Inc., and the United States opposed the petition. Both parties claimed priority to the property. The lower court granted the administrator's request for relief, holding that the status of Romani Industries, Inc. as a first-in-time judgment lien creditor gave it priority over the government's subse-

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[1] As the Superior Court noted, although there was no order of final distribution in this case, the practical effect of the court's order was to end the administration of the estate by awarding its sole asset to one of the competing creditors. Therefore, the order is final and appealable. *See Estate of Montgomery*, 367 Pa.Super. 31, 532 A.2d 439 (1987).

[2] The original judgment was entered at No. 1985-205 and it was subsequently revived on June 7, 1989. The 1989 judgment was entered at No. 1989-1311 and remains unpaid.

quently filed tax lien. Order dated July 7, 1994, Court of Common Pleas of Cambria County, G.D. No. 11-94-14. The Superior Court affirmed *per curiam*. *In re Estate of Francis Romani*, 445 Pa.Super. 637, 664 A.2d 1064 (1995). This appeal followed.

The question presented is whether section 6323(a) of the Tax Lien Act,[3] 26 U.S.C. § 6323(a), ("section 6323"), limits the operation of section 3713(a)(1) of the federal insolvency statute, 31 U.S.C. § 3713(a)(1), ("section 3713"), as to tax debts.[4] Romani Industries, Inc. argues that its judgment lien has priority over a tax claim of the United States because, under section 6323, the holder of a properly entered judgment lien has priority over subsequently filed tax lien debts. The United States disagrees, arguing that it has an absolute priority under section 3713 to all proceeds remaining in an insolvent estate, regardless of the time of filing of the tax liens.

Section 6323 provides for a "first in time" priority to the rival lien in federal tax lien matters as follows:

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[3] Tax Lien Act of 1966, Pub.L.No. 89-719, 80 Stat. 1125, amending 26 U.S.C. § 6323.

[4] We addressed this issue in *Estate of Berretta*, 493 Pa. 441, 426 A.2d 1098 (1981) where an evenly divided plurality held that section 6323 impliedly repealed the operation of the relevant insolvency statute, Revised Statutes § 3466, 31 U.S.C. § 191, with respect to tax lien debts of a decedent's insolvent estate. *Berretta* dealt with the relative priority of a "first in time" judgment creditor, a bank, and the United States to certain proceeds remaining from the sale of two parcels of real property included in the insolvent estate of the taxpayer.

Validity And Priority Against Certain Persons

(a) *Purchasers, Holders of Security Interests, Mechanic's Lienors and Judgment Lien Creditors.*—The lien imposed by section 6321 [a federal tax lien] shall not be valid as against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until notice thereof which meets the requirements of subsection (f) has been filed by the Secretary. . . .[5]

Tax liens have been authorized by predecessor tax lien statutes. *See*, Act of July 13, 1866, ch. 184, § 9, 14 Stat. 107. It was not until 1966 with the amendment of section 6323, however, that the statute specified priority rules to resolve conflicts between federal tax liens and rival liens.[6]

Section 3713 provides for an absolute priority for federal tax claims in insolvency as follows:

Priority Of Government Claims

(a)(1) A claim of the United States shall be paid first when-

(B) the estate of a deceased debtor, in the custody of the executor or administrator, is not enough to pay all the debts of the debtor.

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[5] Section 6321, 26 U.S.C. § 6321, creates a lien in favor of the United States for the amount of tax that anyone has neglected to pay on the property belonging to such person.

[6] Although section 6323 is undoubtedly a lien statute, it also addresses the priority of federal tax liens against judgment lien creditors. Thus, both statutes address priority of competing liens.

The predecessor to section 3713 was Revised Statute § 3466, 31 U.S.C. § 191, which has been substantially unchanged since 1797. ("section 3466"). *See*, Act of March of [*sic*] March 3, 1797 ch. 20, § 5, 1 Stat. 515.

The Court has not decided the question presented. It has cautioned, however, that in considering whether other provisions of the tax lien act operated as implied exceptions to the insolvency statute, "[o]nly the plainest inconsistency would warrant our finding an implied exception to the operation of so clear a command as that of section 3466." *United States v. Emory*, 314 U.S. 423, 433, 62 S.Ct. 317, 322-23, 86 L.Ed. 315, 325 (1941);[7] *United States v. Key*, 397 U.S. 322, 90 S.Ct. 1049, 25 L.Ed.2d 340 (1970).[8] In *Key*, the Court said that a reviewing court is to

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[7] *Emory* involved a federally guaranteed loan under the National Housing Act ("NHA"). When the debtor became insolvent, the United States was owed $5,988.88 as the guarantor of the NHA loan and claimed priority under section 3466. The nonfederal parties claimed "about $900" for wages. The Court held that Section 3466 and the NHA were not plainly inconsistent because there was no provision in the NHA that expressly relinquished the priority of the United States with respect to claims arising under it. 314 U.S. at 430, 62 S.Ct. at 321, 86 L.Ed. at 323.

[8] *Key* involved a bankruptcy reorganization plan that provided for payment of claims of unsecured creditors before full payment of the federal tax claims. The Court found that section 3466 prevailed because no inconsistency existed between that section and three relevant sections of the Bankruptcy Act which required that the United States be paid its taxes under a reorganization plan. The Court concluded that neither the requirement that the United States be paid nor the requirement that the payment be fair and equitable conflicted with the command of section 3466 that the United States be paid first. 397 U.S. at 328-29, 90 S.Ct. at 1053, 25 L.Ed.2d at 346-47.

determine whether the statutes are facially inconsistent and, if so, whether the legislative history of the competing statute reflects a congressional intent to modify the effect of the insolvency statute. *Id.* at 324, 90 S.Ct. at 1051, 25 L.Ed.2d at 344 (1970).[9]

The first issue is whether there is a plain inconsistency between the priority of section 6323 and the absolute priority granted the United States by section 3713. Here, the government's relative priority as a creditor differs depending on which section is applied. Section 6323 states that nonfederal claims that have been duly filed prior to the filing of the federal tax claim are valid as against federal tax claims. On the other hand, section 3713 gives an absolute priority to the United States against other creditors of insolvent debtors for tax liens regardless of when the tax lien was filed. We are constrained to find a facial inconsistency because, with respect to tax liens, section 6323 provides for a "first in time"

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[9] We could utilize a principle of statutory construction to resolve the conflict and conclude that section 6323 limits section 3713. That principle is that a conflict between various statutes is to be avoided and, if possible, the apparent conflicting provisions must be construed together with the more specific provisions prevailing over the general ones. *Busic v. United States*, 446 U.S. 398, 100 S.Ct. 1747, 64 L.Ed.2d 381 (1980); *Morton v. Mancari*, 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974). Here, section 6323 is the more specific provision because it applies only to federal tax liens, whereas section 3713 is the more general provision in that it applies to any unpaid claim of the government against an insolvent debtor. Therefore, applying this principle of statutory construction, the general provisions of section 3713 are limited by the specific provisions of section 6323.

priority while section 3713 gives absolute priority to the United States.[10]

Since we have determined that the statutes are plainly inconsistent, we next address whether the Tax Lien Act of 1966 evidences a congressional intent that federal priorities in insolvency be limited in the tax area. We look to *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 99 S.Ct. 1448, 59 L.Ed.2d 711 (1979) as the most recent expression of the Court on the policy considerations that underlie the question of whether the government in the tax arena is to be treated as an ordinary creditor or as a creditor with super-priority. In *Kimbell Foods*, the Court held that Congress intended that the "first in time is first in right" principle of section 6323 applied in federal government lending cases involving solvent debtors.[11]

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[10] The United States argues, and other courts have held, that no plain inconsistency exists between the statutes. *See, e.g., Carter v. Carter and T-Cas of America, Inc.*, 681 F.Supp. 323, 326 (E.D. Va. 1988) where the court said that because Congress was silent on the matter, the court would infer that Congress intended the Tax Lien Act of 1966 to supplement section 3713 and not to displace it so that in certain cases of taxpayer insolvency, section 3713 governs, and in all other cases, section 6323 controls.

We disagree with this conclusion and find support in other federal cases. *See* note 17, *infra*.

[11] In *Kimbell Foods*, O.K. Super Markets, ("O.K.") borrowed, during 1968, $27,000 from Kimbell Foods. The parties executed security agreements containing a standard "dragnet" clause that provided that the collateral would secure future advances from Kimbell Foods. Kimbell Foods properly perfected its security interest.

In February, 1969, O.K. borrowed $300,000 from Republic National Bank, ("bank") with the bank accepting as security the same property specified in Kimbell Foods' 1968 agree-

The Court ruled that government lending agencies, such as the Small Business Administration, are to be afforded the same priority as private lenders under non-discriminatory state laws, absent a congressional directive to the contrary. 440 U.S. at 740, 99 S.Ct. at 1465, 59 L.Ed.2d at 731.

The Court articulated two reasons for its holding. First, Congress, by the passage of the Tax Lien Act of 1966, expressed its disapproval of "unrestricted federal priority" in tax matters. 440 U.S. at 738, 99 S.Ct. at 1463, 59 L.Ed.2d at 730. *See*, 26 U.S.C. §§ 6323(b), (c), (d), and (e). The Court explained that,

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ments. The bank perfected its security interest. The Small Business Administration ("SBA") guaranteed 90% of this loan under the Small Business Act, which does not, in this situation, specify priority rules to govern the SBA's security interests. O.K. used the bank loan to satisfy the remainder of the 1968 obligation to Kimbell Foods and to discharge a debt for inventory purchased from Kimbell Foods on open account. In late 1970, the bank assigned its security interest to the SBA. O.K. defaulted on the SBA-guaranteed loan shortly before mid-January, 1971.

Kimbell Foods continued to sell to O.K. on open account until the debt was over $18,258.57 on January 15, 1971, when Kimbell Foods sued O.K. to recover on its inventory debt. The SBA recorded the bank's assignment on January 21, 1971. The United States honored its guarantee on the defaulted loan and paid the bank 90% of the outstanding debt on February 3, 1971. That same day, O.K., with the approval of its creditors, sold its equipment and inventory and placed the proceeds in escrow pending the resolution of the competing claims to the funds.

A year later, the state court entered judgment against O.K. and awarded Kimbell Foods $24,445.37, which represented the inventory debt and other items. Kimbell Foods then brought suit in early 1972 in federal court to foreclose on its lien, claiming it had a security interest in the escrow fund that was superior to the SBA's interest.

prior to the 1966 law, it had formulated the "choate lien" test which modified the "first in time is first in right" idea by requiring that the nonfederal lien be sufficiently specific and perfected to overcome the priority of the United States in insolvency cases. 440 U.S. at 720, 99 S.Ct. at 1454, 59 L.Ed.2d at 719.[12] The practical effect of the choateness test, the Court said, was that rival liens were defeated because they failed to pass its strict test. *Id.*[13] The Court concluded that the Tax Law of 1966 reflected congressional intent to disapprove unrestricted federal priority in tax matters[14] and to displace the "choateness" doctrine.

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[12] The Court also stated that it applied the choateness doctrine in the solvency context to give federal tax liens special priority. *See United States v. Security Trust & Savings Bank*, *supra*, 340 U.S. at 51, 71 S.Ct. at 111, 95 L.Ed. at 53. For a discussion of the history of the choate lien test, *see* Kennedy, *The Relative Priority of the Federal Government: The Pernicious Career of the Inchoate and General Lien*, 63 Yale L.J. 905 (1954). *Kimbell Foods*, 440 U.S. at 721 n. 8, 99 S.Ct. at 1454 n. 8, 59 L.Ed.2d at 719 n. 8.

[13] We observe that the Court has not yet held that a perfected and specific lien is excepted from the operation of section 3466 or section 3713. Rather, the Court has raised but avoided the issue in cases before 1966 by holding that the asserted lien was not sufficiently perfected and specific to qualify under any possible exception. *See*, *United States v. Gilbert Associates, Inc.*, 345 U.S. 361, 73 S.Ct. 701, 97 L.Ed. 1071 (1953); *Illinois v. Campbell*, 329 U.S. 362, 67 S.Ct. 340, 91 L.Ed. 348 (1946); *United States v. Waddill, Holland & Flinn, Inc.*, 323 U.S. 353, 65 S.Ct. 304, 89 L.Ed. 294 (1945); *United States v. Texas*, 314 U.S. 480, 62 S.Ct. 350, 86 L.Ed. 356 (1941); and, *New York v. Maclay*, 288 U.S. 290, 53 S.Ct. 323, 77 L.Ed. 754 (1933).

[14] The Court further explained that:

> . . . Of particular relevance here, the Act added mechanic's liens to the list of private interests already protected

440 U.S. at 720 n. 6, 99 S.Ct. at 1454 n. 6, 59 L.Ed.2d at 719 n. 6.[15]

Second, the Court explained that restrictions on federal tax lien priority are necessary to facilitate commercial stability and to avoid the frustration of expectations of superior lien holders. The Court recognized that federal lien priority undercuts the reliability of the notice filing system, which plays a crucial role in commercial dealings. 440 U.S. at 739 n. 42, 99 S.Ct. at 1464 n. 42, 59 L.Ed.2d at 731 n. 42. Prior creditors either have no trustworthy means of discovering the undisclosed security interest or, if they are aware of the federal lien, have to adjust

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against unrecorded tax liens. 26 U.S.C. § 6323(a). Holders of consensual security interests also receive priority over unrecorded tax liens. *Ibid.* Moreover, the Act gives priority to many types of nonfederal liens even when the Government had filed notice of the tax lien. § 6323(b). Included in this group are repairman's liens in personal property, S 6323(b)(5), . . . and in limited situations, liens securing advances. § 6323(c).

440 U.S. at 738 n. 41, 99 S.Ct. at 1464 n. 41, 59 L.Ed.2d at 730 n. 41.

[15] We also note that the legislative history of the Tax Lien Act of 1966 indicates a Congressional intent that priority to the "first in time" lien exists whether a lien was "choate" or not. *See* Senate Finance Committee's Report 1708 which stated:

> [I]t is intended that, under the bill, the various types of interests defined in this provision are to have a priority over a nonfiled Federal tax lien if they come within the definitions of these terms [e. g., "purchaser," "judgment lien creditor," etc.] . . . whether or not in all other regards they are definite and complete at the time notice of the tax lien is filed.

U.S. Code Congressional and Administrative News, 89th Congress, 2d Sess., v. 3, 1966, 3722, 3724-25.

their lending arrangements to protect against the stringent choateness requirements. *Id.*[16] Further, the Court said, considerable uncertainty would also result from the choateness approach because the development of priority rules on a case-by-case basis, depending on the types of competing liens involved, leaves creditors without a definite body of law they require in structuring sound business transactions. *Id.* For these reasons, the Court concluded, Congress intended that restrictions on federal tax lien priority exist.

Although *Kimbell Foods* involves the priority to be accorded a federal consensual loan where the debtor is solvent, and the case at bar involves the question of the priority to be accorded a federal tax lien where the debtor is insolvent, we believe that *Kimbell Foods* and other cases[17] provide guidance as to how the

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[16] Judge Haynsworth observed that the Tax Lien Act of 1966 would be essentially meaningless if the insolvency statute always prevailed. *See*, the concurring opinion of Judge Haynsworth in *H.B. Agsten & Sons, Inc. v. Huntington Trust & Savings Bank*, 388 F.2d 156, 161 (4th Cir. 1967), *cert. den.* 390 U.S. 1025, 88 S.Ct. 1413, 20 L.Ed.2d 282 (1968):

> . . . The question of priorities [between section 6323 and section 3713] is wholly or largely academic, unless the debtor is insolvent, and the clearly stated purpose of the Federal Tax Lien Act of 1966 was to regulate the priority of federal tax claims when competing for payment out of the assets of an insolvent taxpayer with secured claims which would enjoy priority under state law.

[17] *See United States v. Randall*, 401 U.S. 513, 91 S.Ct. 991, 28 L.Ed.2d 273 (1971) (specific priorities of the Bankruptcy Act override the general priority of the United States under section 3466). *See also, United States v. S.K.A. Associates, Inc.*, 600 F.2d 513 (5th Cir. 1979) (SBA lien in an insolvency held not entitled to priority under section 3466); *United States*

federal courts would resolve the case at bar.[18] Here, there is a plain inconsistency between the competing

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v. Burlington Industries, 600 F.2d 517 (5th Cir.1979) (contest between federal agency's security interest and a warehouseman to be decided under nondiscriminatory state law); *City of Vermillion, S.D. v. Stan Houston Equipment Co.*, 341 F.Supp. 707, 713 (D.S.D. 1972).

Court decisions announced before the Tax Lien Act of 1966 support an opposite result. While we do not disregard these cases, we believe that Congressional enactments in the federal tax lien area place the older cases in a less persuasive perspective. *See United States v. Vermont*, 377 U.S. 351, 84 S.Ct. 1267, 12 L.Ed.2d 370 (1964) (in dictum: section 3466 applies to all an insolvent's debts to the government, whether or not arising from taxes); *United States v. City of New Britain*, 347 U.S. 81, 74 S.Ct. 367, 98 L.Ed. 520 (1954) (in dictum: section 3466 imposes an absolute priority in insolvency, but not applied because the record did not establish that the debtor was insolvent); *United States v. Gilbert Associates, Inc.*, 345 U.S. 361, 73 S.Ct. 701, 97 L.Ed. 1071 (1953) (United States tax lien held to have priority under section 3466); *United States v. Security Trust and Savings Bank*, 340 U.S. 47, 71 S.Ct. 111, 95 L.Ed. 53 (1950) (in dictum: section 3466 permits no exception and applies to all debts of the United States whether or not arising from taxes whether or not secured by a lien).

We also are not persuaded by the reasoning of other federal courts that have held that section 3713 provides for absolute priority in tax lien cases for, we believe, those courts did not adequately address the policy considerations weighed in *Kimbell Foods*. *See, e.g., Jonathan's Landing, Inc. v. Townsend*, 960 F.2d 1538 (11th Cir. 1992); *Westmoreland v. Westmoreland, Executrix, and the United States*, 716 F.Supp. 217 (D.S.C. 1988); *Carter v. Carter and T-Cas of America, Inc.*, 681 F.Supp. 323 (E.D. Va. 1988) and *Nesbitt v. U.S.*, 445 F.Supp. 824 (N.D. Cal. 1978).

[18] Since we are construing federal statutes, federal law controls. A state cannot impair the standing of federal liens without the consent of Congress. *United States v. City of New Britain*, 347 U.S. 81, 84, 74 S.Ct. 367, 369, 98 L.Ed. 520, 525 (1954).

[19] Finally, the United States argues that the lien of Romani Industries, Inc. was not sufficiently specific and perfected to displace the first priority of the United States under section 3713. Since this issue was not addressed by the lower courts, it is inappropriate for us to consider it at this time.

statutes. Also, the Tax Lien Act of 1966 evidences a congressional intent that federal priorities be limited in the tax area, regardless of whether the debtor is insolvent. Further, to hold otherwise would frustrate the congressional purpose by defeating in insolvency the very interests that were specifically protected against federal priority in non-insolvency situations. Finally, the grant of absolute federal priority in insolvency cases, as in solvency cases, would be destructive of commercial stability and would frustrate legitimate commercial expectations. We hold, therefore, that section 6323 limits the operation of section 3713 as to tax debts.[19]

Order affirmed.

Messrs. Justice Castille and Nigro concur in the result.

JUDGMENT ENTERED THIS 17TH DAY OF JANUARY, 1997,

/s/ CANDACE FRY
CHIEF CLERK

APPENDIX B

SUPERIOR COURT OF PENNSYLVANIA
PITTSBURGH DISTRICT

No. 1358 PITTSBURGH 1994

IN RE: ESTATE OF FRANCIS J. ROMANI

v.

APPEAL OF: THE UNITED STATES OF AMERICA

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of Cambria County be, and the same is hereby affirmed.

BY THE COURT:

/s/ ELEANOR R. VALECHO
DEPUTY PROTHONOTARY

DATED: May 12, 1995

IN THE SUPERIOR COURT
OF PENNSYLVANIA

No. 1358 PITTSBURGH 1994

IN RE: ESTATE OF FRANCIS J. ROMANI

v.

APPEAL OF: THE UNITED STATES OF AMERICA

Appeal from the Order
Entered July 7, 1994
in the Court of Common Pleas,
Orphans Division
Cambria County, No. G.D. No. 11-94-14

[MAY 12, 1995]

MEMORANDUM

Before: CAVANAUGH, JOHNSON and SAYLOR, JJ.

This is an appeal by the United States from an order granting appellee's petition to transfer real estate in lieu of execution. We affirm.[1]

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[1] Although there was no order of final distribution in this case, the practical effect of the court's order was to end the administration of the estate by awarding its sole asset to one of the competing creditors. Therefore the order is final and appealable. *Estate of Montgomery*, 367 Pa.Super. 31, 531 A.2d 439 (1987).

Francis J. Romani, the decedent, died on January 13, 1992. Prior to his death, on January 25, 1985, a judgment lien was entered against him in favor of Romani Industries, Inc. in the amount of $400,000. The judgment was entered at No. 1985-205. The judgment was subsequently revived on June 7, 1989. It was entered at No. 1989-1311, and remains unpaid. The sole asset of the decedent's estate is a piece of real estate valued at $53,001. The estate is insolvent, as its debts greatly exceed the value of this sole asset. Subsequent to the entry of judgment against decedent, the Internal Revenue Service filed notice of a federal tax lien against the decedent for unpaid taxes and an unpaid civil penalty, that with interest totaled $489,720.04.

The administrator of the estate filed a petition to transfer real estate in lieu of execution on behalf of the judgment creditor, Romani Industries, Inc. The United States opposed the petition. A hearing was conducted on April 14, 1994, at which time the arguments of counsel were heard.

Romani Industries, Inc. claimed priority pursuant to the Federal Tax Lien Act, 26 U.S.C. §6323(a) which provides that a federal tax lien shall not be valid against a judgment lien creditor until notice thereof has been properly filed.[2] On the other hand, the

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[2] The Federal Tax Lien Act provides in pertinent part:

§ 6323. VALIDITY AND PRIORITY AGAINST CERTAIN PERSONS.

(a) Purchasers, holders of security interests, mechanic's lienors and judgment lien creditors. - The lien imposed by section 6321 [a federal tax lien] shall not be valid against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until notice thereof which meets with the requirements of subsection (f) has been filed by the Secretary. 26 U.S.C. §6323(a).

United States claimed priority pursuant to the Federal Insolvency Statute, 31 U.S.C. §3713(a)(1)(B), which provides that the United States is entitled to first priority among creditors of an insolvent estate.[3]

The court granted the petition, holding that Romani Industries' status as a first in time judgment lien creditor gave it priority over the government's subsequently filed tax lien. The court based its decision, in part, on *In Re Estate of Berretta*, 453 Pa. 441, 426 A.2d 1098 (1981), a case in which an evenly divided plurality of the Pennsylvania Supreme Court held that Section 6323 of the Federal Tax Lien Act impliedly repealed Section 3713 of the Federal Insolvency Statute.[4] The present appeal by the United States follows and requires us to determine which statute should properly be given effect.

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[3] The Federal Insolvency Statute provides in pertinent part:

§ 3713. PRIORITY OF GOVERNMENT CLAIMS.

(a)(1) -a claim of the United States government shall be paid first when-

(B) the estate of a deceased debtor, in the custody of the executor or administrator, is not enough to pay all the debts of the debtor.

31 U.S.C. §3713(a)(1)(B).

[4] We are, of course, not bound by this decision, as an equally divided plurality decision has no binding precedential value as a ruling on the merits. *Commonwealth v. Rightnour*, 469 Pa. 107, 364 A.2d 927 (1976); *Commonwealth v. Covil*, 474 Pa. 375, 378 A.2d 841 (1977).

We initially note that since we are construing federal statutes, federal law controls. *See United States v. New Britain*, 347 U.S. 81, 74 S.Ct. 367, 98 L.Ed. 510 (1953) (a state cannot impair the standing of federal liens without the consent of Congress). The United States Supreme Court has never squarely considered the question whether Section 6323 constitutes an implied exception to the Insolvency Statute. It has, however, had occasion to consider whether other provisions operate as implied exceptions. In so doing, the Court has held that "[o]nly the plainest inconsistency would warrant our finding an implied exception to the operation of so clear a command as that of [Section 3713 of the Insolvency Statute]." *United States v. Emory*, 314 U.S. 423, 433, 62 S.Ct. 317, 322-23, 66 L.Ed. 315 (1941).

In *United States v. Key*, 397 U.S. 322, 90 S.Ct. 1049, 25 L.Ed 340 (1970), a case cited by the United States to support its argument for priority status, the Supreme Court considered whether a "plainest inconsistency" existed between the Insolvency Statute and Chapter X of the Bankruptcy Act. In deciding that no such inconsistency existed, the Court set forth a three part test to be used in determining whether a "plainest inconsistency" exists sufficient to warrant an implied exception to federal priority in insolvency. Applied to the present case, the test requires that in order to establish the existence of a "plainest inconsistency" between the statutes, it must be demonstrated that 1) the Insolvency Statute and Section 6323 are facially inconsistent; or 2) an unconditional application of the Insolvency Statute would render Section 6323 meaningless; or 3) the legislative history of Section 6323 reflects a Congressional intent to modify the effect of the Insolvency Statute.

The United States argues that none of these three criteria are met, and that, therefore, Section 6323 contains no implied exception to the Insolvency Statute. In particular, the United States argues that, as regards the first prong of the test, the two statutes are not facially inconsistent. It avers:

> Section 3713 and Section 6323 are not facially inconsistent. Section 6323(a) is a lien statute which applies regardless of the solvency of the debtor and protects enumerated third parties from unrecorded federal tax liens when the debtor conveys property. The Federal Insolvency Statute, on the other hand, is a priority statute, not a lien statute, and encompasses all federal claims.

We find this argument unpersuasive. Rather, our review persuades us that both sections clearly address the question of the federal government's *priority as a competing creditor*. Although the Federal Tax Lien Act is undoubtedly a lien statute, Section 6323 thereof clearly addresses the *priority* of federal tax liens against judgment lien creditors. Similarly, the Insolvency Statute addresses the *priority* of all federal claims against other creditors of insolvent debtors. In the present context there can be no dispute that the government's relative priority as a creditor differs depending upon which section is applied. Since this inconsistency between the respective statute sections produces conflicting results, we are constrained to find that the statute sections in question are arguably facially inconsistent, and are, most certainly, conflicting. We therefore turn to

traditional rules of statutory construction to resolve the conflict.

It is a familiar and time honored principle of statutory construction that a conflict between various statutes is to be avoided and if possible the apparent conflicting provisions must be construed together with the more specific provisions prevailing over the general ones. *Townsend v. Little*, 109 U.S. 504, 3 S.Ct. 357, 27 L.Ed. 1012 (1883); *Kepner v. United States*, 195 U.S. 100, 24 S.Ct. 797, 49 L.Ed. 114 (1904); *Bulova Watch Co. v. United States*, 365 U.S. 753, 81 S.Ct. 864, 6 L.Ed.2d 72 (1961); *Morton v. Mancari*, 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974); *Busic v. United States*, 446 U.S. 398, 100 S.Ct. 1747, 64 L.Ed.2d 381 (1980). In the case sub judice, Section 6323 is the more specific provision because it applies *only* to federal tax liens, whereas the Insolvency Statute is the more general provision in that it applies to *any* unpaid claim of the government against an insolvent debtor. Therefore, the general provisions of Section 3713 of the Insolvency Statute must be limited by the specific provisions of Section 6323 of the Federal Tax Lien Act. For this reason, we conclude that the court's determination that Romani Industries, Inc. possessed priority over the United States by virtue of its status as a first in time judgment lien creditor was proper.

We affirm the court's grant of Romani Industries Inc's petition to transfer real estate in lieu of execution.

Order affirmed.

APPENDIX C

IN THE COURT OF COMMON PLEAS OF
CAMBRIA COUNTY, PENNSYLVANIA
ORPHANS COURT DIVISION

No. 11-94-14

IN RE: THE ESTATE OF FRANCIS J. ROMANI

APPEARANCES:

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FOR INTERNAL REVENUE SERVICE:
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OPINION AND ORDER

Before: THE HONORABLE THOMAS A. SWOPE, JR., JUDGE OF THE FORTH-SEVENTH JUDICIAL DISTRICT OF PENNSYLVANIA

This matter is before the court on a Petition To Transfer Real Estate In Lieu Of Execution filed by the Administrator of the above captioned estate, on behalf of the creditor, Romani Industries, Inc. The United States opposes the Petition. A hearing was held on April 18, 1994, at which time arguments of counsel were heard. The court grants the Petition.

The facts in this case are not in question. The decedent died on January 13, 1992. Prior to his death, on January 25, 1985 a judgement was entered against the decedent in favor of Romani Industries, Inc. in the amount of $400,000.00. The judgement was entered to No. 1985-205 and was subsequently revived on June 7, 1989, entered to No. 1989-1311. No amount of the judgement has been paid. Romani Industries, Inc. is the first in time judgement lien creditor. The sole known asset of the estate is a piece of real estate located in Portage Borough, valued at $53,001.00. The Internal Revenue Service holds a tax lien, filed after Romani Industries, Inc. perfected its lien. The assets of the estate are completely inadequate to satisfy the debts of the estate.

The issue to be resolved is whether the United States' tax lien has priority over the first in time judgement lien of Romani Industries, Inc. Romani Industries argues it has priority pursuant to the Federal Tax Lien Act, which provides in relevant part:

> (a) Purchases, holders of security interests, mechanic's lienors and judgement lien creditors.—The lien imposed by section 6321 shall not be valid as against any purchaser, holder of a security interest, mechanic's lienor, or judgement creditor until notice thereof which meets the requirements of subsection (f) has been filed by the Secretary or his delegate. 26 U.S.C. § 6323.

Concomitantly, the United States argues that it has priority by virtue of the Insolvency Statute, which states in pertinent part:

> (a)(1)—a claim of the United States government shall be paid first when—

> (B) the estate of a deceased debtor, in the custody of the executor or administrator, is not enough to pay all debts of the debtor. 31 U.S.C. § 3713.

This exact issue was addressed in *In re Barretta*, 493 Pa. 441 (1981), in which a plurality of the Supreme Court held that a judgement lien creditor had priority over a federal tax lien where the judgement lien was first in time. The plurality concluded that a plain inconsistency exists between the two statutes. *Id.* at 457. In addition, "the Tax Lien Act evidences a Congressional intent that federal priority be limited in the tax area," whereby the Act impliedly repeals the absolute federal priority of the Insolvency Statute as to tax debts owed to the United States. *Id.* The court reasoned that the United States Supreme Court had restricted federal priority in federal lending cases for reason which are equally applicable in tax lien cases. *Id.* Moreover, "to grant absolute federal priority would be destructive of commercial stability and would frustrate legitimate commercial expectations." *Id.*.

This court adopts the reasoning of the plurality in *Barretta*. As a matter of statutory construction, specific statutory provisions should prevail over conflicting general provisions. *In re Meyer's Estate*, 159 Pa. Super. 296, 305 (1946). The Insolvency Statute is a general mandate for federal priority in insolvency situations. However, the subsequently enacted Tax Lien Act specifically addresses the priority of federal tax liens. In the case sub judice, a different result would be reached depending on whether the Act or the Statute is applied. Faced with this conflict, the Act should be applied because it was enacted to govern tax

debts specifically, whereas the Statute references federal debts generally.

The court finds the argument, advanced by the dissent in *Barretta*, that the an unconditional application of the Insolvency Statute would not preclude the meaningful operation of the Tax Lien Act, untenable. Attempting to fit the Tax Lien Act into the legal gaps in the Insolvency Statute limits the tax lien priorities arbitrarily, so that they bear little relation to the intended scope of the Act. To limit the operation of the Tax Lien exclusively to cases involving solvent tax debtors, would render the lien priorities meaningless, as the issue of priority is moot if the debtor possessed sufficient assets to satisfy all claims. Indeed, the question of lien priorities is significant only when the debtor is insolvent. Consequently, interpreting the Tax Lien Act so as to avoid conflict with the Insolvency Statute would effectively reduce the Act to little more than an academic exercise.

The effect of the Tax Lien Act is to promote commercial stability by assuring members of the favored classes, as set forth in the Act, such as judgement lien creditors, that their legitimate security interests in the property of a debtor will not be disturbed by the existence of an unrecorded federal tax lien. Eliminating this assurance in insolvency cases "would undercut the reliability of the notice filing system, which plays a crucial role in commercial dealings." *Barretta*, 493 Pa. at 455. Otherwise, the fundamental unfairness of denying the unsuspecting and innocent lien holder priority over a subsequent federal tax lien frustrates legitimate commercial expectations, thereby preventing the exercise of reasonable business forethought. The Tax Lien Act by its very language is designed to

protect certain classes of creditors from the reach of later filed tax liens and promote commercial dealings.

ACCORDINGLY THE FOLLOWING ORDER IS ENTERED.

IN THE COURT OF COMMON PLEAS OF
CAMBRIA COUNTY, PENNSYLVANIA
ORPHANS COURT DIVISION

No. 11-94-14

IN RE: THE ESTATE OF FRANCIS J. ROMANI

ORDER

Before: THE HONORABLE THOMAS A. SWOPE, JR., JUDGE OF THE FORTH-SEVENTH JUDICIAL DISTRICT OF PENNSYLVANIA

AND NOW, this 7th day of July, 1994, it is hereby ORDERED and DECREED that the Petition To Transfer Real Estate In Lieu Of Execution is GRANTED.

BY THE COURT

/s/ SWOPE
THOMAS A. SWOPE, JR., JUDGE

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
MAY 27 1997
CLERK

(2)

No. 96 - 1613

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

UNITED STATES OF AMERICA,

Petitioner,

v.

ESTATE OF FRANCIS J. ROMANI,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

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BRIEF IN OPPOSITION OF ROMANI INDUSTRIES, INC.

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8 pp

QUESTION PRESENTED

In the case of an insolvent estate, when the government holds a tax lien that is subordinate to a private judgment lien under the Tax Lien Act, 26 U.S.C. § 6323(a), is the government nonetheless entitled to priority under the Insolvency Act, 31 U.S.C. § 3713(a)?

PARTIES TO THE PROCEEDINGS

This case involves competing claims to the Estate of Francis J. Romani. The United States contends that it is entitled to the assets of the estate under 31 U.S.C. § 3713(a). Romani Industries, Inc., which holds a judgment lien against the estate, asserts that its lien has priority over the tax lien the United States under 26 U.S.C. § 6323(a). Romani Industries and the United States were the two parties to the proceedings below. *See* Pet. App. 2a-3a. Romani Industries therefore properly is a respondent in this matter, S. Ct. Rule 12.6, and opposes the petition.

Romani Industries has no parent company or nonwholly owned subsidiaries.

By Order, the Clerk of the Court extended the time for filing this Brief in Opposition to and including May 27, 1997.

BRIEF IN OPPOSITION OF ROMANI INDUSTRIES, INC.

BACKGROUND

In January 1985, Romani Industries, Inc. secured a $400,000 judgment lien against the property of Francis Romani. Subsequently, the United States filed a notice of a federal tax lien against the property for approximately $400,000. The tax lien arose as a matter of law under 26 U.S.C. § 6321 from taxes owed by Francis Romani, and also encompassed a civil penalty.

Francis Romani died seven years later, leaving as his entire estate a building worth just over $50,000. The estate's administrator then petitioned the local Court of Common Pleas to transfer title to the building to Romani Industries based on the judgment lien, but the United States entered an opposition, claiming priority under the Insolvency Act of 1797, 31 U.S.C. § 3713(a). That statute provides that a "claim of the United States Government shall be paid first when . . . the estate of a deceased debtor, in the custody of the executor or administrator, is not enough to pay all debts of the debtor."

The Court of Common Pleas, however, rejected the United States' claim of priority based on the Tax Lien Act, 26 U.S.C. § 6323(a). That statute provides that a federal tax lien "shall not be valid as against any . . . judgment lien creditor until notice thereof . . . has been filed." Because the government had not filed notice of the tax lien until after Romani Industries had entered its judgment lien, the Court of Common Pleas held that Romani Industries held first-in-time priority to the building. Pet. App. 23a. It therefore approved the transfer of the building to Romani Industries. On appeal by the government, the Superior and Supreme courts of Pennsylvania affirmed. Pet. App. 1a, 15a.

The United States then petitioned for review in this Court.

REASONS FOR DENYING THE WRIT

1. The petition for a writ of certiorari should be denied because it involves only a narrow division in the lower courts, which has existed for thirty years, and which has remained unchanged for seventeen years. The decision below does not make new law in

Pennsylvania, for as Petitioner explains, at 5 n.2, "[t]he Pennsylvania courts have long taken a narrow view of the absolute priority statute" in tax lien cases. Specifically, in 1946 the Pennsylvania Supreme Court held that the Tax Lien Act gives prior liens priority over federal claims brought under the Insolvency Act. *In re Decker's Estate*, 49 A.2d 714 (Pa. 1946), *cert. denied*, 331 U.S. 807 (1947). In 1967 and 1980, the Sixth and Ninth Circuits reached the opposite conclusion, the latter by summary ruling. *Kentucky v. United States*, 383 F.2d 13 (6th Cir. 1967);[1] *Nesbitt v. United States*, 622 F.2d 433 (9th Cir. 1980), *cert. denied*, 451 U.S. 984 (1981). No other federal court of appeals has decided this issue.[2]

Petitioner's passing suggestion of a conflict with the Fifth Circuit, Pet. 20 ("see also *Exchange Bank & Trust Co.* v. *Tubbs Mfg. Co.*, 246 F.2d 141 (5th Cir.), cert. denied, 355 U.S. 868 (1957)."), is not correct: the Fifth Circuit has not addressed the question presented by this case. The *Exchange Bank* decision dealt only with *mortgage* liens, which identify specific property and are choate. *See* 246 F.2d at 142 (applying circuit precedent that the Insolvency Act "has no application to a valid, specific and perfected, a fully choate lien"); *accord Southern Ry. v. United States*, 306 F.2d 119, 125 (5th Cir. 1962); *Creditors Exch. Serv. v. United States*, 277 F. Supp. 885, 888-89 (S.D. Tex. 1967) (explaining that *Exchange Bank* held that a "perfected and choate lien defeats federal priority"). Petitioner itself explains, at 10 n.5, that this Court has long held that the

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[1] The Sixth Circuit has not had the opportunity to address whether it would reach a different result in light of the substantial 1966 amendments to the Tax Lien Act, discussed *infra* at 4-5, which "place the older cases in a less persuasive perspective," Pet. App. 12a n.17.

[2] Petitioner appropriately does not allege a conflict between the ruling below and *Jonathan's Landing v. Townsend*, 960 F.2d 1538, 1542 (11th Cir. 1992), *cited in* Pet. App. 12 n.17, which decided the unrelated question whether the Insolvency Act applies when a government lien forces a debtor into bankruptcy.

Insolvency Act does not give the United States priority over mortgage liens.

At bottom, then, Petitioner complains that Pennsylvania's half-century-old rule on the priority of tax liens in insolvency created a conflict beginning with the Sixth Circuit's 1967 ruling in *Kentucky v. United States*, 383 F.2d 13, and ending with the Ninth Circuit's 1980 summary ruling in *Nesbitt*, 622 F.2d 433. The law has remained unchanged for nearly two decades, and Petitioner has presented no ground requiring this Court to intervene now.

2. Certainly, certiorari is not warranted on the ground that the issue is recurring and important, as exemplified by the near absence of relevant appellate rulings. Petitioner admits, at 13 n.7, that the Tax Lien and Insolvency Acts intersect only when (1) property is subject to both a federal lien for a tax debt and a previously perfected lien under state law, and (2) the owner of the property satisfies the particular criteria of the Insolvency Act. This is a very rare circumstance indeed. For example, no district court has published a decision on the question since *Westmoreland v. Westmoreland*, 716 F. Supp. 217 (D.S.C. 1988), and *Carter v. Carter*, 681 F. Supp. 323 (E.D. Va. 1988), nearly a decade ago. And, while Petitioner does identify three state court rulings, *see* Pet. 19-20, only one of those was decided in the past decade, and none was decided by the state's highest court. Moreover, while Petitioner asserts, at 20, that "[t]he question frequently arises in connection with estate proceedings in state courts," it cites only one case for that proposition, *Succession of Nobles*, 684 So. 2d 973 (La. Ct. App. 1996), and that decision never even mentions, much less decides, the merits of this issue. Petitioner's assertions that "[t]he question is frequently raised, frequently litigated and often placed in doubt," Pet. 19, and that the current state of the law "foment[s] recurring and wasteful litigation," Pet. 20, therefore are incorrect.

3. Finally, certiorari is not warranted on the theory that the Pennsylvania Supreme Court misapplied the precedents of this Court. It is settled that a statute creates an implied exception to

the Insolvency Act in any of three circumstances: (1) the statute is "logically inconsistent with the terms of the [Insolvency Act]"; (2) the statute "[would] be rendered redundant if the [Insolvency Act] applied"; or (3) the statute's "language or legislative history reveal a purpose or legislative history incongruous with [the Insolvency Act's] application." *United States v. Key*, 397 U.S. 322, 326 (1970). The Pennsylvania Supreme Court properly concluded that the Tax Lien Act gives prior judgment lienholders priority under either the first or third prongs of that test.

The Insolvency and Tax Lien Acts are logically inconsistent. For two centuries, the Insolvency Act has granted the United States absolute priority in recovering obligations from insolvent debtors. The United States prevailed over all competing creditors no matter whether it had perfected or secured its interest. Congress subsequently provided through the Tax Lien Act that liens securing federal tax debts have *no* priority "as against any . . . judgment lien creditor until notice thereof . . . has been filed." 26 U.S.C. § 6323(a). The duties and obligations of the United States, as well as the rights and priorities of competing creditors, therefore are fundamentally different under the two acts, bringing the Tax Lien Act into conflict with the Insolvency Act.

Moreover, application of the Insolvency Act to assign priority to the United States would defeat Congress' purpose as reflected in the 1966 amendments to the Tax Lien Act, which "specif[ied] priority rules to resolve conflicts between federal tax liens and rival liens." *United States v. Kimbell Foods*, 440 U.S. 715, 721 n.6 (1979). While the amendments do not control this case, Congress in 1966 made clear that the Tax Lien Act was designed to deny unrestricted federal priority over creditors that lacked notice of the federal lien. Thus, "Congress sought to 'improv[e] the status of private secured creditors' and prevent impairment of commercial financing transactions by 'moderniz[ing] . . . the relationship of Federal tax liens to the interests of other creditors.'" *Id.* at 738 (quoting S. Rep. No. 1708, 89th Cong., 2d Sess. 1-2 (1966) (alterations in *Kimbell Foods*)). Petitioner, however, would vitiate Congress' purpose by subordinating the

interests of creditors despite the fact that they lack notice of the claim of the United States. "To ignore Congress' disapproval of unrestricted federal priority in an area as important to the Nation's stability as taxation would be inconsistent with" this Court's "function . . . to effectuate congressional policy." *Id.*

Petitioner infers that Congress did not intend the Tax Lien Act to limit the priority of federal tax liens in insolvency from its failure to enact a proposal of the American Bar Association. Pet. 18. But as Petitioner argues in another pending case, "[t]hat alternative bills . . . contained express language [addressing the issue] does not establish that the legislation ultimately passed does not reach such conduct." Br. for the United States, *Paradies v. United States*, No. 96-1346, at 10. Nothing in the legislative record indicates that Congress disagreed with the goal of the ABA proposal, and the failure to adopt it suggests just as plausibly that Congress believed that the statute, as written, already reached that result. Moreover, if Congress *disapproved* of decisions such as Pennsylvania's 1946 ruling in *Decker's Estate*, 49 A.2d 714, it could easily have overturned them when it amended the Tax Lien Act in 1966.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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